

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES E. MORRISON,

Defendant-Appellant.

UNPUBLISHED

June 19, 2001

No. 221721

Wayne Circuit Court

Criminal Division

LC No. 98-010848

Before: Hoekstra, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree home invasion, MCL 750.110a(3), and larceny in a building, MCL 750.360. He was sentenced to concurrent prison terms of 32 to 180 months for the home invasion conviction and 32 to 48 months for the larceny conviction. Defendant appeals as of right. We affirm.

Defendant argues that he was denied the effective assistance of counsel based upon three allegations of error. Because defendant failed to request an evidentiary hearing or move for a new trial on this basis, this issue has not been preserved for review. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). Accordingly, our review is limited to errors apparent from the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999); *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). In *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000), our Supreme Court articulated the proper standard of review for claims of ineffective assistance of counsel:

For a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. As for deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. As for prejudice, a defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different [*Toma, supra* at 302-303 (citations omitted).]

Defendant first argues that his counsel erred by informing the court that an investigator had been unable to corroborate defendant's version of the events. We conclude that there is no reasonable possibility that, but for the alleged error, the result of the proceeding would have been different. Even without the statement, the trial court would have been aware that defendant's version of the events lacked corroboration by other defense witnesses. Absent a showing of prejudice, defendant is not entitled to relief.

Defendant also claims that counsel was ineffective when she stated during closing argument: "And I would indicate to the Court that there may be some possible credibility to the defendant's version, because I don't believe that anybody would get up there and make up a story as incredulous as this[.]" Considered in context, and in light of defendant's testimony, it is apparent that counsel was attempting to convert the inherent implausibility of defendant's testimony into a reason to believe it, because a person would not fabricate such an improbable story. We conclude that counsel's argument was a matter of trial strategy, which we will not second-guess with the benefit of hindsight. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994); *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000). Thus, defendant has not established that he is entitled to relief on this basis.

Finally, defendant argues that counsel was ineffective for failing to obtain a fingerprint analysis after the court granted his motion for a fingerprint analysis of the videocassette recorder. Counsel's reasons for not following-up on the motion are not apparent from the record. Even if a fingerprint analysis failed to reveal defendant's fingerprints, this alone would not establish that he did not handle the VCR. On the other hand, had defendant's prints been detected, it would have severely undermined defendant's defense. Counsel may have intentionally decided not to pursue the issue as a matter of strategy, and defendant has not overcome the presumption of sound strategy. *Toma, supra* at 302.

Accordingly, we reject defendant's claim that reversal is required because he was denied the effective assistance of counsel.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael J. Talbot
/s/ Brian K. Zahra